Re Gan Eu Gin (L) & Anor

HIGH COURT (SHAH ALAM) — JOINT DIVORCE PETITION NO 33JP-217–03 OF 2018
HAYATUL AKMAL JC
2 NOVEMBER 2018

Family Law — Divorce — Decree nisi granted — Application to set aside decree nisi absolute — Whether decree nisi absolute — Whether decree nisi absolute could be set aside — Divorce and Matrimonial Proceedings Rules 1980 r 53 — Law Reform (Marriage and Divorce) Act 1976 s 61 — Rules of Court 2012 O 92 r 4

This was an application (encl 13) filed by the petitioner wife ('PW') under s 61 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') and/or under O 92 r 4 Rules of Court 2012. Among the prayers was to set aside the decree nisi dated 5 April 2018 that had already became absolute three months after the decree nisi was granted. Petitioner husband ('PH') and PW were legally married on 10 September 2011. On 16 March 2018, PH and PW had jointly presented a joint petition for divorce. The threshold for the petitioners to seek a divorce decree pursuant to s 52 of the Act was met and the court granted an order in terms of the prayers as prayed. The court ordered that the marriage be dissolved, and further ordered that the decree nisi should be made absolute upon expiry of three months unless sufficient reasons be given to the court within that three months from the date of the order dated 5 April 2018 why the decree nisi ought not to be made absolute. The date of the expiration of the three month period fell on 4 July 2018. However, on 4 July 2018 the PW had filed the application to set aside the decree nisi over allegation that the terms in the said joint petition for divorce were not favourable to her, she alleged that she was forced to agree to the said terms and neither was she properly advised by the acting solicitor for the said petition. By referring to r 53 of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980'), PW submitted that a decree was only made absolute on lodging a notice in Form 8. PW submitted that she had filed this application (encl 13) before any application was made to make the decree nisi absolute ie before the filling of the said Form 8. The issues for consideration were: (a) whether the decree nisi was absolute; and (b) whether the decree nisi absolute could be set aside.

Held, dismissing the application:

(1) Section 61 did not apply to joint petition under s 52 of the Act but rather it only applied to single petition under s 53 of the Act and for that reason alone this application ought to be dismissed in limine. The words of

s 61(2) of the Act denoted that there were two opposing parties in the decree nisi ie the words 'by the party to whom it was granted' and 'the party could have made' referred to the petitioner in a divorce petition, whereas, the words 'the party against whom it was granted' referred to the respondent in a divorce petition (see para 15).

(2) The marriage between PH and PW was legally dissolved on 4 July 2018, ie upon the expiry of the three-month period after the said decree nisi was granted and the application in Form 8 of the DMPR 1980, was merely a formality to complete the divorce proceedings. The fact PH had delayed in lodging Form 8 was not a ground to set aside the decree absolute since it was merely a procedural formality and did not go to the merit of the case. Hence, the decree nisi had become absolute. By setting aside an order that was perfected, sealed and the said decree nisi that had already become absolute by order of the court would be even more unjust to PH. The three months period for the said decree nisi to be made absolute was a reasonable enough time to allow parties to appraise their respective situation prior to the absolute dissolution of the said marriage taking place (see para 16).

[Bahasa Malaysia summary

Ini adalah permohonan (lampiran 13) yang difailkan oleh isteri pempetisyen ('PW') di bawah s 61 Akta Memperbaharui Undang-Undang (Perkahwinan Dan Perceraian) 1976 ('Akta') dan/atau di bawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012. Antara permohonan tersebut adalah untuk mengenepikan decree nisi bertarikh 5 April 2018 yang telah menjadi mutlak tiga bulan setelah surat decree nisi diberikan. Suami pempetisyen ('PH') dan PW berkahwin secara sah pada 10 September 2011. Pada 16 Mac 2018, PH dan PW bersama-sama menyampaikan petisyen bersama untuk perceraian. Syarat bagi pempetisyen untuk mendapatkan perintah perceraian menurut s 52 Akta telah dipenuhi dan mahkamah memberikan perintah dari segi permohonan yang dipohon. Mahkamah memerintahkan supaya perkahwinan itu dibubarkan, dan selanjutnya memerintahkan supaya decree nisi itu menjadi mutlak apabila tamat tempoh tiga bulan melainkan jika alasan yang mencukupi diberikan kepada mahkamah dalam tempoh tiga bulan dari tarikh perintah bertarikh 5 April 2018 mengapa decree nisi itu sepatutnya tidak dibuat mutlak. Tarikh tamat tempoh tiga bulan jatuh pada 4 Julai 2018. Walau bagaimanapun, pada 4 Julai 2018, PW telah memfailkan permohonan untuk mengenepikan perintah itu atas tuduhan bahawa syarat-syarat dalam petisyen bersama untuk perceraian itu tidak menguntungkannya, dia mendakwa bahawa dia terpaksa bersetuju dengan terma tersebut dan dia juga tidak dinasihatkan dengan betul oleh peguamcara untuk petisyen tersebut. Dengan merujuk kepada k 53 Kaedah-Kaedah Prosiding Perceraian dan Perkahwinan 1980 ('DMPR 1980'), PW mengemukakan bahawa satu decree hanya menjadi mutlak dengan membuat notis dalam Borang 8. PW mengemukakan bahawa dia telah

memfailkan permohonan ini (lampiran 13) sebelum sebarang permohonan dibuat untuk membuat decree nisi itu mutlak sebelum pemfailan Borang 8 tersebut. Isu-isu untuk pertimbangan adalah: (a) sama ada decree nisi adalah mutlak; dan (b) sama ada decree nisi mutlak boleh diketepikan.

Diputuskan, menolak permohonan:

(1) Seksyen 61 tidak terpakai untuk petisyen bersama di bawah s 52 Akta tetapi sebaliknya hanya terpakai kepada petisyen tunggal di bawah s 53 Akta dan oleh sebab itu sahaja permohonan ini patut ditolak in limine. Perkataan s 61(2) Akta menandakan bahawa terdapat dua pihak yang bertentangan dalam decree nisi iaitu perkataan 'pihak yang kepadanya ia telah diberi' dan 'pihak itu boleh membuat' merujuk kepada pempetisyen dalam perceraian petisyen, sedangkan, kata-kata 'pihak yang terhadapnya dekri nisi itu diberi' merujuk kepada responden dalam petisyen perceraian (lihat perenggan 15).

(2) Perkahwinan antara PH dan PW telah dibubarkan secara sah pada 4 Julai 2018, iaitu apabila tamatnya tempoh tiga bulan selepas decree nisi yang dikeluarkan dan permohonan dalam Borang 8 DMPR 1980, hanyalah suatu formaliti untuk melengkapkan prosiding perceraian. Hakikat bahawa PH telah tertangguh dalam penyerahan Borang 8 bukan alasan untuk mengenepikan decree mutlak kerana ia hanyalah suatu prosedur formaliti dan tidak sesuai dengan merit kes. Oleh itu, decree nisi telah menjadi mutlak. Dengan mengenepikan suatu perintah yang telah disempurnakan, dimeteraikan dan decree nisi yang telah menjadi mutlak oleh perintah mahkamah akan menjadi lebih tidak adil kepada PH. Tempoh tiga bulan untuk decree nisi menjadi mutlak adalah masa yang cukup munasabah untuk membolehkan pihak menilai situasi masing-masing sebelum pembubaran mutlak perkahwinan tersebut berlaku (lihat perenggan 16).]

Notes

For cases on decree nisi granted, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4194–4198.

Cases referred to

Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal [2018] MLJU 38; [2018] 5 CLJ 273, CA (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909, FC (refd)

Lah Ah Chai v Chong Mee Ling [2005] 2 MLJ 580; [2004] 1 LNS 641, HC (refd)

Liew Nyuk Ching v Jong Khee Kie [2013] 4 MLJ 930; [2013] 1 LNS 189, HC (refd)

Low Choon Kung v Tham Chan Kum [2004] SGDC 139 (refd)

Ng Boon Chwee & Anor [2018] MLJU 737; [2018] 1 LNS 744, HC (folld)
Ng Say Chuan (h) v Lim Szu Ling (w) and another application [2010] 4 MLJ 796; [2010] 10 CLJ 371, HC (refd)
Suci Mathews v Thomas Mathews [1985] 2 MLJ 228; [1985] 1 CLJ 788 (refd)
Wong Cheng Ping v Chin Guan Seng @ Tan Guan Seng [2010] MLJU 226; [2009] 1 LNS 1627; [2010] 5 AMR 171, HC (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 53, 100, Forms 8, 9
Interpretation Acts 1948 and 1967
Law Reform (Marriage and Divorce) Act 1976 ss 52, 53, 61, 61(1), (2), (2)(b)
Rules of Court 2012 O 92 r 4

Gan Siew Guat (Gan Chu Ping with her) (Yong Dan Rakan Rakan) for the petitioner wife.
S Ravichandran (Lee Shu Min with him) (Seah Balan Ravi & Co) for the petitioner husband.

Hayatul Akmal JC:

INTRODUCTION

[1] This is an application (encl 13) filed by the second petitioner (petitioner wife — ('PW')) under s 61 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') and/or under O 92 r 4 of the Rules of Court 2012 ('the RC 2012'). Among the prayers is to set aside the decree nisi dated 5 April 2018 ('the said decree nisi') that had already became absolute three months after the said decree nisi was granted. PW is also asking for stay of the said decree nisi and other prayers pending the determination of this application.

[2] The relevant cause papers and written submissions, are as follows:

(a) encl 13: the application filed on 4 July 2018;

(b) encl 14: PW's affidavit in support affirmed by Ng Sin Yin on 4 July 2018;

(c) encl 28: PH's affidavit in reply affirmed by Gan Eu Gin on 30 July 2018;

(d) encl 29: PW's affidavit in further reply affirmed by Ng Sin Yin on 7 August 2018;

(e) encl 34: solicitor's affidavit affirmed by Kam Booi Keong on 9 August 2018; and

(f) submissions/submissions in reply by PW and PH.

[3] This application was heard before me on 10 August 2018 and after

perusing the cause papers filed, respective written submissions of the parties, I dismissed the said application with no order as to cost. Dissatisfied, PW had filed this appeal and my reasons are as follows.

BRIEF FACTS

[4] PH and PW were legally married on 10 September 2011 and were blessed with two boys, name Covell Gan Junn Yett Tan (7+ years old) and Ayden Gan Junn Lerr (5+ years old) and together they will be referred to as 'the said children'. On 16 March 2018, PH and PW had jointly presented a joint petition for divorce and this court fixed 5 April 2018 for hearing of the said petition. Both PH and PW were represented by counsel and on 5 April 2018 both were present in open court and the terms in the prayers were read out by learned counsel. This court was satisfied that both PH and PW understood the prayers as prayed and had freely consented to the filing of the joint petition for divorce and this court was also satisfied that the filing of the joint petition for divorce had met the requirement of the expiration of two years from the date of the marriage. Therefore, the threshold for the petitioners to seek a divorce decree pursuant to s 52 of the Act was met and this court granted an order in terms of the prayers as prayed. This court ordered that the marriage be dissolved, and further ordered that the decree of divorce (or decree nisi) shall be made absolute upon expiry of three months unless sufficient reasons be given to the court within that three months from the date of the order dated 5 April 2018 why the decree nisi ought not to be made absolute. The date of the expiration of the three month period fell on 4 July 2018.

[5] However, on 4 July 2018 the PW had filed this application to set aside the said decree nisi over allegation that the terms in the said joint petition for divorce were not favourable to her, she now alleges that she was forced to agree to the said terms and neither was she properly advised by the acting solicitor for the said petition.

ISSUE TO BE TRIED

Whether the decree nisi dated 5 April 2018 that was made absolute on 4 July 2018, can be set aside on the grounds of inadequate counsel for not advising PW on terms not favourable to her.

SUBMISSION BY THE PETITIONER WIFE ('PW')

[6] The PW submitted that the application to set aside the said decree nisi was filed before the said decree nisi was made absolute. I was alluded to the case of *Liew Nyuk Ching v Jong Khee Kie* [2013] 4 MLJ 930; [2013] 1 LNS 189, where the decree nisi that was made absolute was set aside based on the merits

of the case. In a Singapore case, *Low Choon Kung v Tham Chan Kum* [2004] SGDC 139, where it was held that:

> Decree absolute was set aside. This decision illustrates not only that the decree absolute may be set aside, but the mere fact that a decree absolute had been issued is not an automatic bar to the rescission of the decree nisi ... However, I am of the view that the court should have the power to rescind a decree absolute even if there has been procedural regularity in service, if circumstances exist which justify the rescission of the decree nisi. The reason for this that it would be wrong in principle if the court's ability to deal with a situation which warrants a rescission of the decree nisi (ie by rescinding the decree nisi) depended on whether a decree absolute happened to have been issued or not. Thus, if the court sees fit to rescind a decree nisi, it should be able to do so, whether or not a decree absolute exists. If a decree absolute exists, then the court should also be able to rescind the decree absolute-indeed, if the decree nisi is rescinded, the decree absolute must also be rescinded, as the latter is an order which is issued to perfect the former, and should not be able to exist without it.

[7] By referring to r 53 of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980'), PW submitted that a decree is only made absolute on lodging a notice in Form 8. In the present case, PW submitted that she had filed this application (encl 13) before any application was made to make the decree nisi absolute ie before the filling of the said Form 8. I was alluded to the case of *Suci Mathews v Thomas Mathews* [1985] 2 MLJ 228; [1985] 1 CLJ 788 where decree nisi was obtained on 26 April 1982 and the respondent later passed away on 25 February 1984 ie two years after the decree nisi was obtained. Not knowing the respondent has passed away, the petitioner had on 26 April 1982 filed an application for the decree nisi to be made absolute which was eventually made absolute on 13 April 1984. However, after knowing that the respondent had passed away the petitioner then filed an application to set aside the decree nisi absolute. Applying the above authority, PW submitted that since PH has yet to apply to make the decree nisi absolute, PW is entitled to file this application to set aside the decree nisi dated 5 April 2018.

[8] By referring to s 61 of the Act, PW submitted the decree nisi cannot be made absolute before the completion of the three months. In the present case, since the said decree nisi was granted by this court on 5 April 2018, therefore the three month period should fall on 5 July 2018 and the said application to set aside the said decree nisi was filed on 4 July 2018 ie before the three months period has lapsed and therefore the merits of the case ought to be heard by this court.

[9] I was referred to the Interpretation Acts 1948 and 1967 which provides as follows:

> 104 Time of Commencement

Where any written law, or any part of a written law, or any instrument or notification made thereunder, is expressed to come into operation on a particular day, it shall, unless it be otherwise expressly provided, be construed as coming into operation immediately on the expiration of the day next preceding such day.

105 Computation of time

In computing time for the purposes of any written law, unless the contrary intention appears —

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (which days are in this section referred to as excluded days) the period shall include the next following day not being an excluded day;

(c) when any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;

(d) when an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

54 Computation of time

(1) In computing time for the purposes of any written law —

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;

(b) if the last day of the period is a weekly holiday or a public holiday (referred to in this subsection as excluded days) the period shall include the next following day which is not an excluded day;

(c) where any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next following day which is not an excluded day; and

(d) where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

(2) Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

[10] By referring to r 100 of the DPMR 1980, PW submitted that the court

has the power for enlargement of time by either extending or abridging the time limited for doing any act, as long as it is just for doing so. And PW further submitted that the application is not prejudicial to PH.

SUBMISSION BY THE PETITIONER HUSBAND ('PH')

[11] PH submitted that the said Decree Nisi was granted based on the consent given by both PH and PW when they filed a joint petition for divorce under s 52 of the Act, and therefore PW cannot proceed under s 61 of the Act to set aside the said decree nisi. PH further submitted that the present application before this court today is an abuse process of court which has the effect of re-litigating the joint petition for divorce when both PH and PW have agreed to file a joint petition for divorce and both of them were present during the court proceeding when the said decree nisi was granted by this court. I was alluded to the decision of Dr Choo Kah Sing J in *Ng Boon Chwee & Anor* [2018] MLJU 737; [2018] 1 LNS 744, as follows:

> [13] After a careful reading of the provision, this court is of the considered view that s 61(2)(b) of the Act only applies to a decree nisi granted under s 53 of the Act, not to a decree nisi which was obtained under s 52 of the Act. The former is a unilateral divorce petition; whereas, the latter is a joint divorce petition.
>
> [14] The words of s 61(2) of the Act in underscore denote that there are two opposing parties in the decree nisi: the words 'by the party to whom it was granted' and 'the party could have made' refer to the petitioner in a divorce petition, whereas, the words 'the party against whom it was granted' refer to the respondent in a divorce petition.
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> [15] The above interpretation is fortified upon an examination of the powers which are accorded to the court under s 61(2)(a) and (b) of the Act.
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> [16] Section 61(2)(a) of the Act allows the court to issue a decree absolute upon application of the party against whom it was granted, the respondent. One reason why the respondent would want to move the court to issue a decree absolute is to enable the respondent to enter into another marriage with someone else.
>
> [17] A certificate of making decree nisi absolute (Form 9 of the Rules) must be issued before either party in the divorce may remarry) (see s 62 of the Act). Hence, if a petitioner refuses, fails, neglects and/or omits to apply for a ce1tificate under Form 9 of the Rules, the respondent cannot remarry if he/she wishes to do so. This will cause inconvenience and injustice to the respondent. Insofar as the court's records are concerned, the marriage between the petitioner and the respondent has been dissolved and the decree nisi has become absolute. However, without the issuance of the certificate in Form 9 of the Rules by the court's registrar, the respondent will not be able to remarry.
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> [18] Section 61(2)(a) of the Act provides a remedy for the respondent. It allows the respondent to apply to the court for the issuance of the certificate, ie make the decree nisi absolute. Once a certificate in Form 9 of the Rules, ie, certificate of making decree nisi absolute, has been issued by the registrar, the respondent (and

the petitioner) are free to marry again pursuant to s 62 of the Act.

[19] Section 61(2)(b) of the Act allows the court to rescind the decree nisi upon an application made by the party against whom the decree nisi was granted. The justification of this provision is that if the party to whom the decree nisi was granted is not interested to file and obtain a decree absolute after three months, the party against whom the decree nisi was made may apply to rescind it on the ground that the party to whom the decree nisi was granted was not serious to see through the proceedings to formally obtain a decree absolute, ie the certificate of Form 9 of the Rules.

In *Lah Ah Chai v Chong Mee Ling* [2005] 2 MLJ 580; [2004] 1 LNS 641, it was the decision of the court that:

3. On perusal of all documents submitted in this case, I am of the view that the petitioner husband has made full and frank disclosure to the petitioner wife prior to the joint petition dated 30 August 2002 of all the assets procured by the petitioner husband during the course of the marriage and before the said decree nisi was made absolute by this court on 16 October 2002 and that all the terms as stated in the joint petition were mutually agreed upon by both the petitioner husband and petitioner wife before the said joint petition was executed on 30 August 2002. The said decree nisi pertaining to the distribution of the matrimonial assets which was granted by this court is a final order. Therefore, the petitioner wife is estopped from applying for a variation of the said decree nisi. In the case of *Minton v Minton* [1979] 1 All ER 79 Lord Scannan has stated the following at pp 87–88:

> But the other, of equal importance, is the principle of the 'clean break'. The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. It would be inconsistent with this principle of the court could not make, as between the spouses, a genuinely final order unless it was prepared to dismiss the application. The present case is a good illustration. The court having made an order giving effect to a comprehensive settlement of all financial and property issues as between spouses, it would be a strange application of the principle of the clean break if, notwithstanding the order, the court could make a future order on a subsequent application made by the wife after the husband had complied with all his obligations.

THE LAW

Whether the decree nisi absolute can be set aside

[12] The Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('the Act') provides instances and proceedings after decree nisi, as follows:

61 Decree nisi and proceedings thereafter

(1) Every decree of divorce shall in the first instance be a decree nisi and shall

A not be made absolute before the expiration of three months from its grant unless the court by general or special order from time to time fixes a shorter period.

(2) Where a decree nisi of divorce has been granted and no application for it to be made absolute has been made by the party to whom it was granted, B then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom it was granted may make an application to the court and on that application the court may —

C (a) notwithstanding the provisions of the last foregoing subsection, make the decree absolute;

(b) rescind the decree nisi;

(c) require further inquiry; or

D (d) otherwise deal with the case as it thinks fit.

[13] The Divorce and Matrimonial Proceedings Rules 1980 ('the DPMR 1980') provides instances where a decree nisi is made absolute.

53 Decree absolute on lodging notice.

E (1) Subject to Rule 54(1), an application by a spouse to make absolute a decree nisi pronounced in his favour may be made by lodging with the registrar a notice in Form 8.

(2) On the lodging of such a notice, the registrar should search the court minutes and if he is satisfied — F

(a) that no appeal against the decree and no application for rehearing of the cause or for rescission of the decree is pending;

(b) that no order has been made by the Federal Court extending the time for appealing against the decree or by a judge extending the time for G making an application for rehearing of the cause or, if any such order has been made, that the time so extended has expired;

(c) that no application for such an order as is mentioned in sub-paragraph (b) is pending;

H (d) that no intervention under Rule 49 is pending; or

(e) that section 77 of the Act does not apply or has been complied with, the registrar shall make the decree absolute:

Provided that if the notice is lodged more than 12 months after the I decree nisi, the registrar may require the applicant to file an affidavit accounting for the delay and may make such order on the application as he thinks fit or refer the application to a judge.

O 92 r 4 of the Rules of Court 2012 ('the RC 2012') provides inherent power to the court to prevent injustice:

Inherent powers of the Court (O 92 r 4)

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

FINDINGS OF THIS COURT

[14] The law on setting aside consent order is trite where once the consent judgment had been perfected, the parties are bound by it and the court is duty bound to enforce the agreed terms of the same. There are plethora of cases that holds a consent order must rarely be disturbed unless there are exceptional circumstances that warrants the intervention of the court and the burden is on the applicant to prove on balance of probabilities that the need to vary legally existed. In the case of *Ng Say Chuan (h) v Lim Szu Ling (w) and another application* [2010] 4 MLJ 796; [2010] 10 CLJ 371 where Yeoh Wee Siam J held that:

[1] A consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. Under s 96 of the Law Reform (Marriage and Divorce)Act 1976 ('the Act'), the court has the discretionary power to vary the interim order for custody or maintenance of the children if there is any material change in the circumstances.

In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909, the Federal Court held that it is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. In *Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal* [2018] MLJU 38; [2018] 5 CLJ 273, Court of Appeal held:

The law on setting aside consent judgment is more than settled and it is this. A consent judgment is only recorded when the respective litigants had agreed in writing as to how to resolve a legal suit. Once the consent judgment had been perfected, the parties are bound by it and the court is duty bound to enforce the agreed terms of the same. The court cannot vary any of the agreed terms unless with the mutual consent of the parties. Hence, one can say that the court is functus officio or in other words, the court is bereft of jurisdiction to entertain any request to set aside such judgment.

[15] It is to be noted that PW is applying to set aside the said decree nisi based on the provision of s 61 of the Act. However, it is my considered view that s 61 does not apply to joint petition under s 52 of the Act (as in the present case) but rather it only applies to single petition under s 53 of the Act and for that reason alone this application ought to be dismissed in limine. I am in agreement with the findings of my learned brother Dr Choo Kah Sing J in *Ng Boon Chwee & Anor* that s 61(2)(b) of the Act only applies to a decree nisi

granted under s 53 of the Act, not to a decree nisi which was obtained under s 52 of the Act because of the words of s 61(2) of the Act denotes that there are two opposing parties in the decree nisi ie the words 'by the party to whom it was granted' and 'the party could have made' refer to the petitioner in a divorce petition, whereas, the words 'the party against whom it was granted' refer to the respondent in a divorce petition.

[16] In light of the foregoing, I am of the considered view that the marriage between PH and PW was legally dissolved on 4 July 2018, ie upon the expiry of the three-month period after the said decree nisi was granted and the application in Form 8 of the DPMR 1980, is merely a formality to complete the divorce proceedings. Insofar as the court's records are concerned, the marriage has been dissolved and the decree nisi has become absolute. I wish to refer to the submission by PW by referring to O 92 r 4 of the RC 2012, the inherent powers of this court to prevent injustice, but it is to be noted too that justice applies both ways and by setting aside an order that was perfected, sealed and the said decree nisi that had already become absolute by order of this court will be even more unjust to PH. The fact PH had delayed in lodging Form 8 is not a ground to set aside the decree absolute in the circumstances of this case since it is merely a procedural formality and does not go to the merit of the case. There must be lawful and appropriate extenuating circumstances to enable the court to exercise its powers and unfortunately in the present case no such circumstances had been presented. PW had agreed to the terms of the joint petition and to allow her to renege on those promises now in absence of lawful circumstances would be an unjust exercise of the court's inherent powers. There is no provision in the Act for the rescinding or setting aside a decree nisi that had already been made absolute. It is the intention of the legislator when the Act was framed to ensure the integrity and finality of a decree nisi that had become absolute. Parties are not allowed to freely apply to have it rescinded or set aside save and except in very exceptional cases or circumstances (see *Wong Cheng Ping v Chin Guan Seng @ Tan Guan Seng* [2010] MLJU 226; [2009] 1 LNS 1627; [2010] 5 AMR 171). It is noteworthy to mention that PW had waited until the last minute to file in this application when the same could have been done with greater haste within the three months period before the said decree nisi became absolute. It is also my considered view that the three months period for the said decree nisi to be made absolute is a reasonable enough time to allow parties to appraise their respective situation prior to the absolute dissolution of the said marriage taking place. It is a time period as prescribed by the Act as framed by the legislators. The court is empowered to grant a lesser waiting period but not more than what is prescribed in the Act (s 61(1) of the Act). Consequently, the issue of abridging or enlarging the time period do not arise. It is also noteworthy to mention that the acting solicitor who acted for both PH and PW during the joint petition has filed an affidavit confirming that PW had acknowledged the terms in the joint petition for divorce ('exh KBK2' — encl 34). Both of them were respectively impressed upon the terms in the

joint petition for divorce where they finally agreed to it as prayed before the said decree nisi was pronounced by the court.

[17] I also would like to briefly address the argument by PW that her application is still before the said decree nisi became absolute contending that it falls on the 5 April 2018. I refer to encl 38 which is a sealed copy of the certificate of making decree nisi absolute (Form 9) by the senior assistant registrar of the High Court confirming that the decree nisi had become absolute on the 4 July 2018 and the said certificate till to this date had not been set aside or challenged and remains valid.

CONCLUSION

[18] In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I dismissed PW's application (encl 13) with no order as to cost.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh